SUPREME COURT, U. S.

No. 650

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In The Supreme Court of the United States

OCTOBER TERM, 1968

CLAUDE W. MARTIN,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

To the Supreme Court of the State of Washington

PAUL KLASEN,
Grant County Prosecuting Attorney
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THE ARGUS PRESS SEATTLE, WASHINGTON

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RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

To the Supreme Court of the State of Washington

The State of Washington respectfully prays that the Court enter an order denying the Petitioner's petition for a Writ of Certiorari to reverse judgment of the Supreme Court.

COUNTER STATEMENT OF THE CASE

Airman Ed Downs of Larson Air Force Base left Moses Lake around 9:00 p.m. on July 6, 1965 on State Highway 17 for Larson Air Force Base on his black Honda motorcycle. Airman Downs wore dark clothing with a white crash helmet. His lights were working (R. 229). Just before the Patton Boulevard entrance, Downs notices a car pulling up behind him. Airman Downs moved to his extreme right and was on the right hand white line near the right hand shoulder of the road, going 30 miles per hour and the next thing he knew he was lying off the road (R. 229).

Airman Downs did not see who struck him from the rear (R. 230). The Airman's motorcycle was thrown 75 feet from the road and the Airman went 36 feet ahead of the bike (R. 62). All of the Airman's clothes were torn off except his shirt (R. 46). He sustained a broken leg and numerous other injuries. The Airman drug himself to the shoulder of the road and eventually Charles Eineichner who was driving from Larson heard screaming about 10.00 p.m. (R. 41). He made a U turn and found the victim lying beside the ditch. A passenger of Eineichner, Robert Snyder stated the victim's clothing was ripped off except the shirt and he had a white crash helmet on. While Eineichner went for an ambulance, Snyder attended Airman Downs. Mr. Snyder pulled a piece of metal chrome auto stripping from the buttocks of Airman Downs. This chrome stripping was imbedded three inches into the victim's rectum (R. 43-48). Shortly thereafter State Trooper Robert McBride arrived. The chrome stripping was given to Trooper McBride and the Trooper commenced an investigation (R. 51). It was determined that the accident happened approximately 9:50 p.m.

The examination of the chrome stripping indicated that it came from a light blue General Motors car manufactured in the 50's (R. 65).

Around 1:30 a.m., July 7, 1965, Trooper McBride was operating a radar check for speeders near one of the entrances of Larson Air Force Base (R. 66). The Petitioner's car was observed going south and using radar, Trooper McBride determined that the Petitioner was going 50 miles per hour in a 40 mile an hour zone (R. 67). Trooper McBride advised the Petitioner he was arrested for speeding and then

walked around to the front of the car and discovered that the right front fender of the car was dented and the chrome strip was missing and there was black paint on the fender (R. 68). Trooper McBride then obtained the piece of chrome from his patrol car, straightened it out, and placed it in the area where the chrome strip should have been (Rd 70). It appeared to match the missing chrome strip whereupon Trooper McBride asked the Petitioner about the missing chrome strip and the Petitioner said he ran into a ditch in Okanogan several days earlier and denied any hit and run (R. 71). Then Trooper McBride asked the Petitioner to follow him to the Moses Lake Police Department where he booked the Petitioner for speeding (R. 71). The Trooper then obtained a complaint from the Justice of the Peace for hit and run, (R. 72), and after advising the Petitioner of his constitutional rights, that anything he said could be used against him, that he had the right to an attorney, (R. 72), the Petitioner stated that he had been home since 11:00 a.m. that day and that nobody had used his vehicle (R. 73). Trooper McBride then took pictures of the Petitioner's car and took flecks of paint from the Petitioner's station wagon. The flecks of paint along with the chrome strip were sent to Spokane County Crime Lab for spectographic analysis (R. 75). Deputy Sheriff Charles Bliesner of Spokane County stated that both paint samples, one from the chrome strip and one from the Petitioner's car would have come from the same source (R. 137).

An extensive investigation was commenced to see if the Petitioner's whereabouts at the time of the accident could be determined.

A Deputy Sheriff circulated a photograph of the

Petitioner at a community known as Wheeler, six and one-half miles from the accident scene (R. 185, 186, 187). Ben Coleman and Don Morgan advised the Deputy that the Petitioner had been engaged in a poker game around 9:00 the night of the accident (R. 177-183). Coleman and Morgan identified the Petitioner from previous acquaintances (R. 188), and stated that the Petitioner became involved in a poker game wherein the Petitioner was clipped for $150.00 in approximately 15 minutes. The Petitioner had brought with him a fifth of whiskey which was consumed, (R. 182), and the Petitioner was observed leaving about 9:00 p.m. (R. 181) in an old Chev. light blue station wagon (R. 182). The Petitioner had lost two checks which totaled $150.00 which Coleman gave to his bondsman Al Hill (R. 180) who immediately took the checks to the Petitioner's bank in Soap Lake and presented them for payment the next morning, July 7 (R. 217). Morgan and Coleman testified that the Petitioner had been drinking and was pretty well looped when he left (R. 186).

The Petitioner presented only character witnesses in his behalf.

Upon this evidence, the lawyer justice of the peace, after extensive argument, took the case under advisement, issued a memorandum of opinion and found the Petitioner guilty of speeding and failure to stop after an accident. The Petitioner appealed to the Superior Court where he was likewise found guilty of hit and run and speeding. Sentence was one year in the County jail with all but sixty (60) days suspended. With the cooperation of the Sheriff, it was arranged for the Petitioner to have treatment with the Petitioner's doctor in Othello if needed during

the sixty day period of confinement. At all times Petitioner has been represented by his present attorney.

REASONS FOR DENYING THE WRIT

I.

Petitioner contends he was deprived of his rights of confrontation of witnesses under the sixth and fourteenth amendments on the basis of the Courts ruling in *Barber v. Page,* 390 U.S. 719, Case No. 7003 decided April 23, 1968. Respondent submits that *Barber v. Page* is not applicable for the following reasons.

1. Respondent did not know the location of the witnesses. In the Justice Court the Petitioner was represented by the same counsel and both witnesses were subject to unlimited cross examination by Petitioner's present counsel. The evidence shows that the witnesses Morgan and Coleman were arrested on a county vagrancy charge approximately seven weeks before the trial date (R. 157). After their arrest, the witnesses Morgan and Coleman went to Clovis, New Mexico, (R. 159), and leaving there they went to Texas (R. 148-157). The evidence shows that the witnesses were not served with a subpoena because they were outside the state and were somewhere in the State of Texas (R. 148-157). The records show that the witnesses were supposed to appear in Justice Court and there was nothing to show that they would not be here for trial (R. 158). Several continuances were granted to allow the bail bondsman to get them back (R. 160). It was expected they would return in the middle of April (R. 150). The Prosecuting Attorney thought they would return (R. 150). The facts

are without dispute that the location of the witnesses were unknown and that they could not be served with a subpoena (R. 165 Ruling of the Court).

In addition, the Respondent submits that there was nothing showing how the Petitioner was prejudged by not having them present. The testimony of the witnesses showed that these witnesses were unsavory characters of very poor moral character.

2. *Barber v. Page* was decided two years after the trial from which the Petitioner complains. There is nothing in *Barber v. Page* to indicate that it should be retroactively applied, even if the facts should fit.

3. Petitioner has never argued *Barber v. Page* before the State Supreme Court. Petitioner's petition for rehearing, by not mentioning this matter, has waived this alleged error.

4. Respondent urges that it was never the intention of the United States Supreme Court to require a more diligent search in the misdemeanor case when the last known addresses of the witnesses were approximately 1,500 to 2,000 miles away somewhere in in the State of Texas.

II.

Petitioner claims he was deprived of his constitutional rights to have a jury pass on an essential factual element of the crime charged.

Respondent, in replying, states that the Petitioner has made no objection to the formula instruction No. 6 appended hereto which sets forth the elements to convict. Petitioner makes no mention of any assigned

error or of any violations of the constitutional rights in this important instruction in his petition for rehearing or in this petition. Respondent submits that it is the law of this case. In this particular case we have a situation where the facts are not contradicted or disputed. The Petitioner did not take the stand to state whether or not, in fact, he knew if he struck Airman Downs. However, the blow was so terrific that the motorcycle was thrown 75 feet and the rider 110 feet. The car came in contact with the motorcycle just below the cross right fender headlight. There can be no question that the motorcycle was revealed by the headlight. None of these facts were disputed. There was no evidence to the contrary and under this state of the evidence, no decision other than guilty as charged could have been reached by the jury. To rule otherwise on the uncontradicted physical evidence is to make a mockery of our judicial system. Under this evidence, how can the Petitioner claim he did not know he hit Airman Downs? If Petitioner claims reversible error, he must show something more than a possibility of prejudice. *State v. Williams,* 132 Wash. 40, 231 Pac. 21 (1924). Before a verdict will be vitiated because a jury considered material not properly before it, there must be a showing of reasonable ground to believe that a defendant has been prejudiced. *State v. Rinkes,* 70 Wn.2d 854, 425, P.2d 658 (1967). *State v. Lemieux,* 75 Wash.2d. 92 (decided Dec. 19, 1968). Respondent submits that there was absolutely no showing of prejudice.

III.

Petitioner alleges he was apprehended under the guise of a speeding charge, his arrest was unlawful and the search and seizure was not incidental to the

speeding charge. The evidence seized became the fruit of an unlawful arrest, search and seizure.

As to the alleged unlawful search and seizure, the question presented in "Does a State Trooper have the authority to detain a driver for a speeding violation and while so detained, examine the outside of the speeder's car?" The Respondent submits that this is not the usual case of a search and seizure since the Trooper only examined the outside of the car. Cases where interiors of the cars are searched and examined are not in point. The removal of the flecks of paint from the Petitioners car was done only after the Petitioner had been served with a warrant charging hit and run and the car was in the possession of the arresting officer. There is no statutory authority to obtain a search warrant for hit and run under Washington Law.

Respondent submits that Petitioner has cited no authority applicable to this set of facts and that the Trooper was acting only as a reasonable individual would have done under the circumstances.

State v. Schwartzenberger, 70 Wash.2d 99, 422 P.2d 323 (1966); *United States v. Rabinowitz,* 339 U.S. 56, at page 65, 66, 94, L.ed 652, 70 Sup. Ct. 430 (1950).

Petitioner contends that the original arrest was without authority since it was made without a warrant. The case of *State v. Michaels,* 60 Wn. 630, 374 P.2d 989 (1962) is easily distinguishable on two points. In the *Michaels* case, the officers were following the car involved and waited for the car to make a traffic violation before stopping it and then search the car. In the instant case, there was no following. The Petitioner's car merely passed doing 50 in a 40

mile an hour zone and was immediately arrested. The search in the instant case merely consisted of the officer walking around the car. There is no indiscriminate rummaging about the exterior of the car. To extend the *Michaels* decision to this set of facts would be an unreasonable restriction placed upon police officers.

It should be pointed out that the Petitioner did not raise this matter in his petition for rehearing before the State Supreme Court.

PROBLEMS PRESENTED BY PETITIONER ARE ACADEMIC

Although Petitioner does not mention it, he was convicted of the crime of speeding along with the hit and run conviction and the penalty imposed by the Court for the speeding was the same as the hit and run penalty, with sentences to be served concurrently. Copy of Judgment and Sentence appended hereto. Petitioner has made no objection to the form of the judgment in any of the proceedings below. Even if the Court should see fit to grant the Writ of Certiorari and also to reverse the hit and run conviction, the Petitioners sentence for speeding would still stand and he would do the same punishment.

CONCLUSION

Respondent submits that none of the Petitioner's constitutional rights have been violated and that the Petitioner has been prosecuted in line with the fair play standards required of the prosecution and that the Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PAUL KLASEN,
Grant County Prosecuting Attorney
Attorney for Respondent

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Telephone: 509 — 754-3573

ACCIDENTS AND REPORTS

46.52.020 Duty in case of injury to or death of person or damage to attended vehicle. (1) An operator of any vehicle involved in an accident resulting in the injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to, and in every event remain at, the scene of such accident until he has fulfilled the requirements of subdivision (3) of this section;

(2) The operator of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible and shall forthwith return to, and in any event shall remain at, the scene of such accident until he has fulfilled the requirements of subdivision (3) of this section:

(3) The operator of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give his name, address and vehicle license number and shall exhibit his vehicle operator's license to any person struck or injured or the operator or any occupant of, or any person attending, any such vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying or the making of arrangements for the carrying of such person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary of if such carrying is requested by the injured person or on his behalf. Under no circumstances shall the rendering

of assistance or other compliance with the provisions of this subsection be evidence of the liability of any operator for such accident;

(4) Any person failing to stop or to comply with any of the requirements of subdivision (3) of this section under said circumstances shall, upon conviction, be punished by imprisonment for not less than thirty days nor more than one year or by a fine of not less than one hundred dollars nor more than five hundred dollars, or by both such fine and imprisonment: *Provided,* That this provision shall not apply to any person injured or incapacitated by such accident to the extent of being physically incapable of complying herewith;

(5) Upon notice of conviction of any person under the provisions of this section, the vehicle operator's license of the person so convicted shall be revoked by the director of licenses.

INSTRUCTION NO. 6

ELEMENTS TO CONVICT:

To convict the Defendant, Claude W. Martin, of the offense of Failure to Stop After an Accident, as charged, the State must prove to you beyond a reasonable doubt:

1. That on or about the 6th day of July, 1965, the Defendant, Claude W. Martin, while operating a motor vehicle upon the public highways of the State of Washington, became involved in an accident wherein Edward L. Downs was injured.

2. That the Defendant, Claude W. Martin, at said time and place did fail to stop, remain and render assistance at the scene of the accident;

3. That said acts occurred in Grant County, State of Washington.

If you find that any of the foregoing elements, 1, 2 or 3, have not been established by the evidence in this case beyond a reasonable doubt, you must acquit the Defendant, but if you find all of these elements to have been so established beyond a reasonable doubt, you should find him guilty as charged.

In the Superior Court of the State of Washington

In and for Grant County.

STATE OF WASHINGTON, Plaintiff,
vs.
CLAUDE W. MARTIN
Defendant.

Judgment and Sentence
(County Jail)

NOW, on this 5th *day of* August, *19* 66, *comes the Prosecuting Attorney with the Defendant and Counsel, into Court; and said Defendant ~~is duly informed by the Court of the nature of the information found against him for the crime of~~* having been found guilty of Failure to Stop After an Accident and Speeding committed on the 6th day of July, 1965 by a verdict of a duly impanelled Jury, *~~committed on the ..... day of ....., A. D. 19..., of his arraignment and plea of ..... Guilty of the offense charged in the Information.~~ Whereupon the said defendant is here asked by the Court if he has any legal cause to show why Judgment should not be pronounced against him, to which he replies that he has none that he has not already shown; and no sufficient cause being shown or appearing otherwise to the Court, thereupon the Court renders its judgment: That whereas the said defendant has been duly convicted in this Court on the* 12th *day of* May, *A. D. 19*66, *of the crime of* Failure to Stop After an Accident & Speeding by jury verdict *it is therefore Ordered Adjudged and Decreed that the said defendant is guilty of the crime of* Failure to Stop After an Accident and Speeding *and that he be punished by* spending 1 year in county jail, all suspended except 60 days - sheriff to arrange treatment of Dft Doctor in Othello if needed during the 60 days. *and that he shall pay the costs of the prosecution as the same may be hereafter taxed, the defendant* Claude W. Martin *is hereby remanded to the custody of the Sheriff of said County to be by him detained in the County Jail of* Grant *County, State of Washington, until such fine and costs are paid or otherwise secured as provided by law.*

Done in open court this 5th *day of* August, *19* 66.

S/ Felix Rea
Judge.

STATE OF WASHINGTON,
County of GRANT } *ss.*

I, PAT O'BRIEN, *County Clerk and ex-officio Clerk of the Superior Court of the State of Washington, for the County of* GRANT, *do hereby certify the foregoing to be a full, true and correct copy of the Judgment and Sentence duly rendered and made by the Hon.....Judge of said Court, on the* 5th *day of* August, *A. D. 19*66, *and now of record in my said office in the above entitled action.*

Attest my hand and the seal of said Superior Court this 5th *day of* August, *A. D. 19*66

PAT O'BRIEN, *Clerk.*

By.....Deputy.